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H.R. 3915

“Mortgage Reform and Anti-Predatory Lending Act of 2007”

Chairman Frank, Ranking Member Bachus and Members of the Committee, my name is Kurt Pfotenhauer and I am Senior Vice President for Government Affairs and Public Policy for the Mortgage Bankers Association (MBA)[1]. I appreciate the opportunity to testify before you today to discuss the "Mortgage Reform and Anti-Predatory Lending Act of 2007" (H.R. 3915) which was introduced just two days ago.

Before I begin, let me thank you Chairman Frank and Ranking Member Bachus for the work you and the Committee have done to offer comprehensive approaches to address problems in the mortgage market. MBA shares your goal of stopping predatory lending. Members of the MBA have long supported the establishment of a uniform national standard as the best means of protecting consumers, providing them the widest array of financing options and lowering their housing costs.

We also greatly appreciate the efforts you and members of the committee have taken to involve MBA and other industry and consumer representatives in the effort to develop these proposals, and we look forward to working with you as the process goes forward. We think that H.R. 3915 takes important steps in the direction of providing a comprehensive set of protections for borrowers.

Nevertheless, we believe that H.R. 3915, as currently drafted, has fundamental flaws that need to be resolved. These include, first and foremost, the lack of preemption of state and local laws, as well several other problems detailed in this statement which will have the unintended effect of cutting off financing options for creditworthy borrowers. We look forward to working with the Committee to address these problems in earnest to develop a bill that can receive MBA's support.

Introduction

Today's hearing is being held during a period of great challenge for the mortgage market. A cooling real estate market and other economic factors have combined to increase mortgage delinquencies which, in turn, have created profound difficulties for many borrowers seeking mortgage credit.

In getting to where we are today, there clearly is enough blame to go around – blame for real estate sales persons and builders, for mortgage brokers, for lenders, for securitizers, for attendant settlement service providers and for some borrowers themselves. The overheated real estate sales market of the past several years increased housing costs and necessitated new mortgage products. Some mortgage brokers and others favored particular products for purchases and refinances that have not proven advantageous for some borrowers. Some lenders compromised sound

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field.

underwriting standards in the face of competitive pressures and a voracious investor appetite for loans. Some borrowers and many investors entered into financing arrangements that assumed continued appreciation and/or unrealistic future earnings. Some "bad apples" across the industry saw the market as an opportunity to make a quick buck, sometimes even by defrauding borrowers and lenders.

We believe that a critical examination of the past, along with a careful look at the reactions of the market and the regulatory framework to date, will help Congress shape a law that will avoid past mistakes without choking off credit. Some problems demand legislative solutions and some have been solved or are being solved in the marketplace already. If we do not perform our task carefully, I am afraid we will harm the continued ability of the real estate finance industry to address the financing needs of borrowers, especially those who are underserved.

Over the last three quarters, based on MBA's National Delinquency Survey data,[2] delinquencies and loans in foreclosure have increased in all sectors of the mortgage market, particularly as a result of record rates for both delinquencies and foreclosures in key Midwestern states owing to job losses. Increases in delinquencies and foreclosures have been greater in the subprime market, particularly for adjustable-rate mortgages (ARMs).[3] In some states, a significant number of delinquencies and loans in foreclosure involve investor properties. As a result of loan performance, lenders and borrowers are facing a "credit crunch" resulting in a notable decrease in liquidity in the Alt. A, subprime and jumbo[4] market sectors. Fannie Mae and Freddie Mac continue to purchase and securitize a large share of the conventional and conforming mortgages,[5] but they provide little liquidity to the subprime sector of the market.[6] Although the Federal Housing Administration (FHA) is working to help borrowers, including those facing difficulties, FHA admits that it can only serve a portion of those in trouble. At this time, jumbo borrowers' mortgage rates are carrying a greater premium than usual over prime rates but liquidity is available for that segment of the market.

There is strong evidence that lenders are underwriting mortgages much more carefully as a result of market pressures and current regulatory guidance. Guidance issued by federal financial regulators earlier this year detailed expectations regarding

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[2] National Delinquency Survey, Mortgage Bankers Association, (Sept. 6, 2007). The delinquency rate for the second quarter of 2007 for one-to-four unit residential properties stood at 5.12 percent of all loans outstanding on a seasonally adjusted basis, up 28 basis points from the first quarter and up 73 basis points from one year prior. The delinquency rate does not include loans in the process of foreclosure.
[3] *Ibid*. There is a clear divergence in performance between fixed rate and adjustable rate mortgages; the seriously delinquent rate for prime fixed loans was essentially unchanged from the first quarter of the year to the second, and the rate actually fell for subprime fixed rate loans. That rate increased 36 basis points for prime ARM loans and 227 basis points for subprime loans.
[4] Jumbo loans are loans with amounts higher than the current conforming loan limit for Fannie Mae and Freddie Mac, which is currently $417,000.
[5] Mortgage Market Note: Portfolio Caps and Conforming Loan Limits, Office of Federal Housing Enterprise Oversight (Sept. 6, 2007). Fannie Mae's and Freddie Mac's combined market share exceeded 50 percent of the mortgage-backed securities issued as of July 2007.
[6] James B. Lockhart III, Director OFHEO, at the Exchequer Club of Washington, Washington, D.C., July 18, 2007. The Enterprises' total book of business through the first quarter of 2007 included $4.5 trillion in mortgage-backed securities, $170 billion of which was subprime.

underwriting, risk management and consumer protection regarding “nontraditional”[7] and subprime mortgages.[8] The guidance initially applied only to federally regulated institutions. Subsequently, as recommended by associations of state regulators, the Nontraditional Guidance has been adopted by 40 states and the District of Columbia and the subprime statement has been adopted by 26 states and the District of Columbia.[9] As a consequence of these factors, low-documentation lending, as well as short-term hybrid ARM and interest-only products are reported to be far less available in the subprime market. We understand loans are not being underwritten to teaser rates.

Mortgage originations have declined as the real estate market has cooled, although interest rates remain historically low. Consumers continue to be served by a range of loan originators who are subject to varied licensing requirements.[10] The prime market is characterized by a wide array of originators and competition; the subprime mortgage market is characterized by a greater presence of mortgage brokers.[11]

The mortgage process remains opaque. Both sets of regulatory guidance addressed consumer disclosures for nontraditional and adjustable products at the time of origination and during loan servicing. These issuances were accompanied by suggested consumer illustrations. The Department of Housing and Urban Development (HUD) reports that it is developing improved Real Estate Settlement Procedures Act (RESPA) disclosures and that a rulemaking is imminent. The Federal Reserve Board (FRB) has indicated that it plans to improve consumer disclosures under the Truth in Lending Act (TILA) as well. MBA believes that a law should be enacted requiring comprehensive simplification of federal and state disclosures.

Generally, the nation’s more than $3 trillion mortgage industry has done an outstanding job for consumers and the larger economy. It has been a driving force in establishing communities, fueling the economy and building wealth for America’s families. Over the last several years, our industry has helped our country achieve a near 70 percent homeownership rate.

In sum, abuses and delinquencies cannot be allowed to eclipse the achievements of the market and undermine its ability to respond to consumer needs in the future. To assure the market’s continued health, we must guard against any legislative or regulatory solutions that are not based on a sound understanding of the market and that have the

[7] 71 F.R. 58609 (October 4, 2006).
[8] 72 F.R. 37569 (July 10, 2007).
[9] The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) both adopted the Guidance on Nontraditional Mortgage Product Risks on January 31, 2007 and the Subprime Statement on July 17, 2007. Several states have since added both provisions’ language to their own regulations so that it applies to institutions they regulate.
[10] Mortgage bankers and mortgage brokers play different roles in the market. For example, mortgage brokers act as intermediaries and arrange loans for borrowers from lenders, while lenders purchase loans originated by mortgage brokers and act as loan “wholesalers” and/or originate loans themselves directly for borrowers through their own retail sales force.
[11] John M. Reich, Director Office of Thrift Supervision, before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services, Washington, D.C. March 27, 2007. Some estimates reported by OTS say that 70 to 80 percent of all subprime mortgages were originated by brokers.

potential to undermine the market's benefits going forward – particularly for those in most in need of credit.

MBA's Core Principles in Reviewing Lending Legislation

Before we examine H.R. 3915, please allow me to share with you our core principles which are as follows:

- **First, and Foremost, Any New Law Must Establish a Truly Uniform National Standard.** As I have indicated, MBA maintains that for a uniform national standard to have our support, it must be both preemptive and set forth objective and clear standards. Specifically, MBA believes that any bill that we support must contain an unequivocal preemption of all state and local laws. No matter how well intentioned, those who advocate that a federal law be a floor – to be supplemented by state laws above and beyond its provisions – the plain fact is that the current patchwork of state and local laws only increases costs for consumers across the market. To add a new federal overlay without subsuming current laws will only add confusion and costs. A patchwork of laws is a barrier to the entry of competitors and an enormous compliance burden on those who compete. The appropriate state role under new legislation should be to assist with the enforcement of new requirements and not to duplicate or contradict them.

  Final legislation must also contain clear and objective, bright-line standards that protect borrowers. Vague standards invite litigation, lessen competition and increase costs. While we recognize that to achieve preemption any new law must comprise a "gold standard" of protections, we believe that result is achievable, as long as the law is both preemptive and clear.

Any new law must also:

- **Preserve the Availability of Credit Options Across the Credit Spectrum.** The prime mortgage market is functioning smoothly and the Alt. A market does not function like the subprime market. Any new legislation, therefore, should only address the problems associated with the subprime mortgage market and not unduly impact the rest of the market. In this connection, MBA believes that any definitions of "prime" and "subprime" embedded in law must work to ensure that prime, Alt. A, FHA and Department of Veterans Affairs (VA) loans are not inadvertently covered. Also, the law should require that regulators periodically revalidate any such definitions to assure that only subprime loans are addressed.

- **Assure the Continued Ability of the Secondary Market to Provide Capital for All Borrowers.** The advent of an active secondary mortgage market following the Great Depression resulted in lower borrowing rates for consumers during both up and down credit cycles. In including any provisions that may assign new liability to the secondary market, legislation must be fashioned to assure that it does not unduly cut off liquidity and the benefits it brings to borrowers. In MBA's view, a preferable approach to address abuses is to stem them where they occur, in the subprime origination market. If it is the intention of Congress to place responsibility on securitizers to act as reviewers of origination practices, then care must be taken to assure that any new requirements are well defined and well targeted to avoid causing a flight from investment in mortgage assets and higher costs for borrowers.

- **Recognize that, Given Current Market Conditions, Actions Must Be Avoided that Will Further Seize Credit.** As indicated, recent increases in delinquencies have resulted in a lack of credit to subprime borrowers and others across the credit spectrum. Of particular concern is the unavailability of credit to borrowers with adjustable-rate mortgage products that reset, who face significantly higher interest rates and monthly payments, and who are seeking or will soon seek to refinance. While FHA and others are attempting to serve these borrowers, it is clear that the subprime market will also be needed to serve them. Any legislation must not unduly impair the mortgage industry’s ability to provide these borrowers good subprime credit options and not strand them in products which they can no longer afford.

- **Avoid Unreasonable Litigation Costs to All Consumers While Assuring Consumers Have Appropriate Remedies.** Remedies under any new bill should provide individual consumers strong and effective redress for any abuses that violate bright-line standards. If the remedies are well conceived and tough, they will deter violations from occurring. On the other hand, if the type of conduct proscribed is vague or undefined, or if the remedies invite broad class actions and excessive damages, the effect will only be to limit competition, and curtail investor interest. Such a result will provide windfalls for litigators and much higher costs for borrowers.

- **Preserve Flexibility So that the Industry Can Continue to Innovate and Respond to Changing Borrowers’ Needs.** While much has been written about lenders providing “exotic mortgage products,” for many borrowers these products proved to be an effective means of navigating high home prices. In recent years, the industry also innovated to create the 40-year mortgage, the 15-year mortgage, the reverse mortgage, the home equity line of credit (HELOC) as well as a variety of low-down payment products. Housing affordability remains a challenge for many borrowers. Any new law must foster and not frustrate continued innovation to respond to changing borrower needs.

- **Preserve an Atmosphere that Allows Diverse Business Models and Structures that Give Consumers Greater Choices and Competition.** A key feature of the American mortgage finance system has been the variety of loan providers that compete for borrowers’ business including: lenders (both depository and non-depository and both federally and state chartered); mortgage bankers; credit unions; and mortgage brokers. Any new law should further and not frustrate the continued diversity of the market.[12] At the same time, MBA believes it is essential that the law make appropriate distinctions to address regulatory needs.

It is clear, for example, that a mortgage broker functions differently than a lender and differing requirements for each are appropriate. A borrower views the broker as shopping on the borrower's behalf, which is not the case with a lender.[13] At the same time lenders and their employees are one and the same and offer products to borrowers that borrowers can shop and compare. MBA therefore believes it may be unnecessary and unwise for legislation to reshape lenders' compensation models for their own employees.

- **Improve Transparency and Consumer Understanding of the Mortgage Process.** MBA has long advocated that the mortgage process is far too complicated and that improvement of consumer disclosures would help stem lending abuse. Consumers today face a pile of disclosures when they apply for and close on a mortgage. Improved disclosure would allow consumers to compare loan products and facilitates market competition to lower costs. On the other hand, too many disclosures or the wrong kinds of disclosures are counterproductive and allow abusers to hide in plain sight.

  MBA notes that HUD and the Federal Reserve Board are working to improve disclosures under RESPA and TILA respectively. Others are calling for a one-page simple form. MBA favors coordination of all of these efforts and a comprehensive approach to streamlining the mortgage process.

Comments on H.R. 3915

As indicated, MBA shares the goal of devising strong, workable legislation that provides clear, objective and balanced standards to protect consumers against predatory lending without hampering the ability of the market to innovate and provide financing options for borrowers. Also, as indicated, we provide comments on H.R. 3915 in that spirit.

As a preliminary matter, H.R. 3915 does not establish a uniform national standard. It does not preempt state and local laws nor does it consistently provide clear and objective standards. The latter point is discussed further in comments to follow. MBA would only support legislation that truly creates a uniform national standard.

The following discusses MBA's concerns with provisions of H.R. 3915 along with MBA's recommendations for improvements:

[12] For 2006, 8,886 institutions including 3,900 commercial banks, 946 institutions, 2,036 credit unions, and 2,004 mortgage companies, reported under HMDA. The National Association of Mortgage Brokers reports 53,000 mortgage brokerage companies, as of 2004, employing an estimated 418,700 people.

[13] Letter dated January 14, 2002 to the Honorable Mel Martinez.

TITLE I
Licensing and Registration
MBA supports national licensing of mortgage originators as well as the creation of a registry that tracks them. This bill would require that states enact licensing laws that meet certain prescribed standards or, after 24 months, beginning on the date of enactment, be subject to a more onerous federal standard to be developed by HUD. In this connection, MBA strongly objects to the directive that HUD regulations shall require a mortgage originator to act solely in the "best interest of the consumer." Lenders owe duties to their stockholders and investors; they cannot at the same time feasibly assume countervailing duties to borrowers. Just as importantly, such a standard would require lenders to undertake an impossible search for the "best terms," ultimately requiring that the lender meet what amounts to a "suitability standard." As such, the provision invites litigation and higher costs for borrowers.

MBA believes that without establishing clear reciprocity requirements the licensing regime under H.R. 3915 would be unworkable. Lenders would be required to pay the licensing costs of several states (sometimes nearly every state) and would be required to comply with individual state licensing requirements. Clear reciprocity, on the other hand, would permit an originator licensed in one state to be licensed in other states. Such an approach would ensure that originators are trained and comply with fundamental requirements and, at the same time, allow them to operate and compete across the nation.

Finally, with respect to the licensing provisions, MBA believes that the exception for licensure of individual originators applicable to depository institutions should be expanded. It should also cover individual originators employed by companies that are: FHA-approved Direct Endorsement lenders, Fannie Mae or Freddie Mac-Approved Sellers, or maintain a net worth equal to or greater than $25,000,000. Companies that already comply with rigorous requirements for their employees should not be required to license them individually.

Duty of Care
MBA supports a duty of care approach that requires lenders and mortgage brokers to present to the consumer a <u>finite</u> range of loan products for which a borrower might qualify following final underwriting, along with the comparative costs and benefits of the products. This type of information should be given after the borrower provides basic information about himself or herself and the location of the property, less than would be required for an application. In that way, the borrower would be given information early in the process to allow him or her to shop and choose the best mortgage. MBA would also support other requirements as part of a duty of care, including that: the lender be qualified, licensed and registered as an originator, and the originator disclose the nature of the originator's relationship with the consumer, along with the originator's unique identifier. H.R. 3915 appears to adopt some of this approach but the timing of the disclosure and its conditional nature must be clarified. In any case, this approach is far preferable to the establishment of a subjective, vague, suitability type standard. While MBA generally supports this approach, we are concerned that without clarification this

section could inadvertently trigger the application of other mortgage related statutes and regulations such as the Fair Credit Reporting Act. We think the legislation should clarify that this is not the case.

Under this provision, MBA believes mortgage brokers would be required to disclose to a consumer whether they will or will not act as the consumer's agent. MBA supports this approach. We also believe mortgage brokers should disclose the amount of any compensation they receive from the lender or borrower.[14] Mortgage brokers function as intermediaries to shop for borrowers, and borrowers working only with brokers cease shopping for themselves. The payment from a lender to the broker should be known to the borrower because it affects the borrower's rate.

Lenders, on the other hand, are vendors selling their own loan products. Loan officers are the lender's representatives and neither they nor lenders hold themselves out as shopping for borrowers. Borrowers shop and compare lenders' costs. For these reasons, MBA believes that it is appropriate for brokers to disclose any fees from lenders. Also, if a broker indicates that it is an agent of the borrower, it should be required to act as such, as the bill suggests in Section 102.

Anti-Steering

H.R. 3915 would prohibit the paying or receiving of incentive compensation to any mortgage originator, directly or indirectly, that is based on or varies with the terms of any residential mortgage loan without differentiating between mortgage bankers and brokers. As context to our comments on this approach, we would like to discuss further the stark functional differences between mortgage lenders and mortgage brokers.

The delivery channels through which borrowers obtain loans vary considerably. In many cases, lenders originate mortgages through their own loan officers or correspondents in response to loan applications submitted through the Internet, call centers, by mail or a visit to a lender's office. Others obtain mortgages originated by mortgage brokers. While there is not definitive data on the breakdown of lender and broker originated loans, it is estimated that mortgage brokers originate more than 50 percent of all loans[15] and 70 to 80 percent of subprime mortgages in any given year.[16]

Some borrowers shop effectively among the range of mortgage originators. Others rely on mortgage brokers to shop for them. Following a hearing concerning mortgage

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[14] Since the early 1990's, following the advent of mortgage brokers, HUD has required that yield spread premiums to mortgage brokers in table funded transactions be disclosed to the borrower as settlement costs. In its 2002 proposed RESPA rule, withdrawn in 2004, HUD sought to make the disclosure clearer than the current requirement which permits disclosure on a notation on a list of fees as (YSP POC or yield spread premium paid outside of closing).

While a lender also may receive compensation based on a loan's yield by investors in the secondary mortgage market, HUD has not required the disclosure of these payments to lenders. Where lenders receive such payments, they are not obtained at settlement. Moreover, many lenders portfolio their loans and do not receive such payments.

[15] Harry Dinham, President of National Association of Mortgage Brokers (October 18, 2006) Study Reveals Brokers Are Less Costly Option For Sub-Prime Borrowers. New Study Finds Factual Evidence that Consumers Pay Less with a Broker <http://www.namb.org/namb/NewsBot.asp?MODE=VIEW&ID=149&SnID=1807988655>. Press release.

[16] See footnote no. 12.

broker compensation on January 8, 2002, Senator Paul S. Sarbanes noted “a borrower’s relationship with a mortgage broker is clearly different than with a lender. A borrower views the broker as shopping on the borrower’s behalf, which is not the case with a lender.”[17]

Loan officers, lenders and brokers may receive compensation based on the rate of the loan that the consumer enters into in addition to fees from the consumer. However, since brokers act as intermediaries and cause consumers to stop shopping and lenders and loan officers are vendors whose prices are shopped and compared, MBA believes it is appropriate for the law to distinguish between lenders, loan officers and mortgage brokers in fashioning anti-steering provisions.

MBA might support a provision forbidding brokers from receiving compensation based on the terms of a loan. MBA believes a better approach, however, is to require full disclosure of a broker’s compensation when the borrower is shopping for a loan. MBA notes that H.R. 3915 permits borrowers to “finance” origination fees if such fees are fully disclosed to the consumer early in the application process and do not vary based on the consumer’s decision whether to finance such fees. This provision should be clarified to expressly permit the use of yield spread premiums (YSPs) to defray some or all of the borrower’s closing costs through a higher interest rate as well as financing these costs. Not clarifying this point would have a deleterious affect on the ability of cash poor borrowers to pay closing costs through a higher rate and monthly payment if they so choose.

Finally, in connection with steering, MBA opposes H.R. 3915’s directive to regulators implementing the anti-steering regulations that the regulations “seek to ensure” that they promote the interest of the consumer in obtaining the “best terms for a mortgage loan for which the consumer qualifies.” Such a directive may require establishment of a subjective standard that is likely to be impossible to achieve, and invite litigation, liability and higher costs for borrowers. Instead, MBA believes that regulations in this area may be workable if they require that the regulators’ implementing regulations provide bright-line standards and safe harbors to clarify what is required.

TITLE II

Ability to Repay/Net Tangible Benefit

Prudent underwriting is the cornerstone of responsible mortgage lending. Lenders have every incentive to properly underwrite a borrower’s ability to repay a mortgage loan. In the event that a loan fails, a lender may be forced to repurchase the loan, investors may decide to no longer do business with the lender and the lender’s reputation will suffer in the community. For these reasons and more, lenders take great care in considering and evaluating a consumer’s ability to make their mortgage payments – across all segments of the market.

MBA would support clear and objective requirements that originators determine a borrower’s ability to repay and that a loan provide the borrower a net tangible benefit

[17] Letter dated January 14, 2002 to the Honorable Mel Martinez.

provided the rules also recognize the dynamism of the market and allow legitimate lending to continue.

H.R. 3915 establishes two safe harbors based on North Carolina's definition of a rate spread loan. The law uses the difference between an annual percentage rate for the loan and the yield on U.S. Treasury securities having comparable periods of maturity equal to or greater than – (1) three percentage points from U.S. Treasury securities for first liens, or (2) five percentage points if the loan is secured by a subordinate lien.[18]

Loans below these thresholds are considered prime loans and are presumed under H.R. 3915 to meet the ability to repay and net tangible benefit requirements. MBA supports this exception as far as it goes but believes similar exceptions should be fashioned for FHA and VA loans. MBA also is concerned that the statutory formulae may not capture the whole prime and Alt. A market. For this reason, MBA believes H.R. 3915 should require that the regulators initially and periodically revalidate these formulae to assure that the safe harbor for prime and Alt. A loans includes these loans as intended.

Loans above the threshold are subject to ability to repay and net tangible benefit standards – which can be satisfied if certain "safe harbors" are met. These loans are referred to as "qualified safe harbor mortgages." The law requires that for "safe harbor mortgages" to meet the "ability to repay" and "net tangible benefit" standards loans must have (1) documented consumer income; (2) an underwriting process based on a fully indexed rate taking into account taxes and insurance (3) debt-to-income ratio not greater than 50 percent or some other percentage prescribed by regulation; (4) no negative amortization (5) other requirements that may be established by regulation; and either (6) fixed payment over at least 7 years; or (7) for an adjustable loan an APR that varies based on a margin that is less than 3 percent over a single generally accepted interest rate index that is the basis for determining the rate of interest on the mortgage.

MBA believes these "safe harbors" are in actuality a new set of underwriting standards. As such, these standards will unnecessarily eliminate many loans in the subprime market and possibly the prime market as well. We strongly recommend that Congress carefully consider the potential impact of these safe harbors before hard-wiring them into law.

A similar three percent trigger in HMDA captures a significant portion of the mortgage market. Data reveal that approximately $623 billion of the $2.5 trillion of mortgages originated in 2006 (according to HMDA) have interest rates that were higher than the

[18] H.R 3915, as in the North Carolina standard, correlates the APR for a loan and the conventional mortgage rate, as follows:

> "The difference between the annual percentage rate for the loan and the conventional mortgage rate is either equal to or greater than (i) 1.75 percentage points (1.75%), if the loan is secured by a first lien mortgage or deed of trust, or (ii) 3.75 percentage points (3.75%), if the loan is secured by a subordinate lien mortgage or deed of trust. For purposes of this calculation, the "conventional mortgage rate" means the most recent daily contract interest rate on commitments for fixed-rate first mortgages published by the Board of Governors of the Federal Reserve System in its Statistical Release H. 15 or any publication that may supersede it during the week preceding the week in which the interest rate for the loan is set.

300 basis point trigger that requires HMDA reporting and would be covered under this bill. Firms identified as subprime originators by HUD only accounted for about $320 billion in originations. About $14 billion of the loans with rates above the 300 basis point trigger were purchased by Fannie Mae and Freddie Mac. In addition, based on the HMDA data, about $283 billion of the mortgages made with rates covered by this bill were made to purchase homes. While the dollar amount of refinance loans was higher at $319 billion, the number of borrowers who relied on loans covered in this bill to purchase homes was larger than the number who used these loans to refinance - about 1.9 million loans to purchase homes versus 1.8 million refinance loans. MBA is willing to provide additional data as available concerning the effects of the bill.

MBA also notes, and strongly opposes H.R. 3915's formulation that the presumption that a loan that meets the safe harbor is "rebuttable" for loans above the threshold. If a loan meets a safe harbor, it should be permissible without further review. If this provision is not clarified, MBA believes it will be impossible to securitize above threshold loans, thus, depriving borrowers of the cost savings achieved by securitization.

MBA will, in any event, continue to work with lawmakers to fine-tune the safe harbors so that legitimate lending is not out of reach for qualified borrowers. MBA also has the following additional comments on each of the requirements for qualified safe harbor loans:

(1) ***Documented consumer income*****.** MBA believes reduced-documentation or stated-income loans can be beneficial and appropriate options for borrowers regardless of the type of loan or category of loan, whether the loan is prime, Alt. A or subprime. There are various segments of the population who have difficulty documenting their income and assets, particularly with a W-2 or bank statement. Self-employed borrowers, for example, present lenders with the greatest challenges in this regard; frequently only gross business receipts are reflected on their tax returns, taking away the usefulness of these documents to show net income. MBA would recommend that if H.R. 3915 maintains a requirement for full documentation it should expressly authorize lenders to "document" income by using information in addition to W-2s, tax returns or banking statements. A lender's inability to use other documentation, such as rental receipts, bills or other relevant documents, could disadvantage some of our most credit starved and creditworthy borrowers and put homeownership out of their reach.

(2) ***Underwriting process based on fully indexed rate (taking into account taxes and insurance)*****.** The Subprime Statement and Nontraditional Guidance provide that loans, where there may be payment shock or less than full documentation or fall into defined categories, must be underwritten to the fully indexed rate and fully amortizing payment. H.R. 3915 would expand these requirements to include all subprime loans regardless of their terms. MBA believes this approach is overly broad, unnecessarily restrictive and would deprive subprime borrowers of affordable financing options. For example, it would require that an ARM loan with a fixed period of five years be underwritten to those standards even though there generally is no payment increase for five years. MBA believes that products such as these should be open to more flexible underwriting standards so that these can be made available to subprime borrowers. While MBA believes that the Subprime Statement and Guidance are restrictive, the market is adjusting to them. If H.R. 3915 seeks to convert these directives into law, it should not expand them beyond their terms.

(3) ***Debt-to-income ratio not greater than 50 percent or some other percentage prescribed by regulation.*** MBA objects to hard-wiring into law a 50 percent debt-to-income ratio for subprime loans for several reasons. Debt-to-income is only one factor in underwriting in today's mortgage market, and not particularly predictive of default. The performance of loans with debt-to-income ratios greater than 50 percent has been good because of other offsetting factors, including strong credit histories, other financial resources, growing income or a borrower's proven cash management abilities. The mortgage industry is dynamic. A decade ago, 28/36 debt ratios were standard in the industry. They were later found to be unduly restrictive. Had these ratios become a hard-wired legal standard, they would have prevented many current homeowners from ever enjoying homeownership. Finally, limitations on what payment or rate is used in underwriting debt-to-income ratios will have disparate effects on borrowers in different areas of the country. For example, in some markets an established borrower can look for a less expensive house requiring a smaller loan. In other, high-cost areas, good borrowers with good incomes need to stretch further since less expensive homes may not be available.

(4*) No negative amortization*. Currently, negative amortization loans are not available to borrowers meeting the HOEPA triggers and H.R. 3915 would effectively expand the requirement to subprime loans.

(5) ***Other requirements that may be established by regulation*.** While MBA does not object to providing additional authority to the regulators to establish additional safe harbor requirements, MBA believes H.R. 3915 should also require that any such requirements be balanced, objective and take into account the needs of consumers in obtaining mortgage finance. MBA also believes that the omission of the Federal Reserve Board from the entities regulating under key portions of H.R. 3915 is unwise. The Board occupies a unique place in and understanding of the national lending system and has long regulated the mortgage industry under TILA and HOEPA. The Board's experience is relevant and its input and participation is warranted.

(6) ***Fixed payment for at least seven years*.** H.R. 3915 would make the safe harbor for subprime loans only available to fixed rate loans with fixed payments for seven years or more. MBA believes that this requirement should be more flexible, and, that if Congress is to require a fixed term, it should be no greater than five years. We think the right approach here is to give the regulators rulemaking authority to make a determination based on market dynamics and the needs of consumers. If a term is chosen, however, five years would be a sufficient period to avoid payment shock and still gives subprime borrowers the option of a more affordable loan for a relatively long period of time.

(7) ***For adjustable-rate loans, an APR that varies based on a margin that is less than 3% over a single generally accepted interest rate index.*** MBA does not believe a rigid ceiling should be written into law because of the dynamism of the market. If Congress believes such a standard is necessary, the regulators should be given flexibility to develop reasonable standards with appropriate guidance and subject to ongoing review. The regulators should be permitted to explore alternative approaches such as a reasonable cap on ARM adjustments instead of tying the safe harbor to the interest rate index.

Net Tangible Benefit

H.R. 3915 would require that all refinance loans provide borrowers a net tangible benefit and leaves to the regulators the task of developing implementing requirements. MBA would consider supporting this approach provided that there were requirements that that implementing rules be clear, objective and economically-based. By economically-based, MBA means that each benefit must be amenable to computation based on objective economic values. By way of examples, these might include a lower rate of more than a specified percentage, a lower payment of a particular percentage or more, a cash-out providing a specified dollar sum or an extension of the loan term for a specific number of years or more. Vague and subjective standards should be avoided. For example, in the context of a cash-out refinance loan, a lender should not be put in a position of determining whether the intended use of the proceeds of a loan is beneficial given the borrower's situation. If clear, objective and reasonable standards are not established, it will be impossible for lenders to determine which requirements pertain; lenders will avoid the subprime market and deprive subprime borrowers of low-cost credit options.

Assignee Liability

Instituting assignee liability to correct errors in the mortgage origination process potentially threatens the availability and cost of mortgage loans. For this reason, MBA believes that if abuses arise during origination then they should be addressed in that arena.

At this point, the secondary market has every incentive to ensure the loans that it buys meet legal requirements and perform well. Investors have recently suffered significant losses. Consequently, the secondary market has significantly tightened guidelines on the loans it will buy. MBA believes this is an area where the market is regulating itself obviating the need for new legal requirements. The secondary market will reject the purchase of loans that expose it to liability and where risk cannot be offset, managed, determined and quantified. We implore lawmakers if they institute enhanced assignee liability to be careful and surgical in crafting such a standard. Otherwise, its impact could result in shutting off needed liquidity for our mortgage finance system.

Additionally, we are concerned that the scope of those who might qualify as an "assignee" is overly broad and could include entities specifically excluded under the Truth in Lending Act. Specifically, we are concerned that servicers would fall under the definition. We believe this is inappropriate given their role in the market. Servicers do not provide capital to the primary mortgage market. They perform the service of collecting payments from the borrower, making payments from escrows and remitting payments to the asset owner. To treat servicers as assignees miscomprehends their functions and is inappropriate.

Warehouse lenders also should be expressly excluded from the definition of “assignee.” These entities hold the loan for a short period of time as security for their temporary advance to a mortgage banker to fund the loan. They do not ordinarily take title to mortgages. Were they to be held liable as assignees, the funding process would be unnecessarily burdened and loan costs would increase for all borrowers.

Finally, in terms of the assignee liability safe harbor, MBA is concerned that the “reasonable due diligence” prong does not adequately specify what amount or type of due diligence must be conducted to satisfy the safe harbor’s requirements. The bill leaves the matter to the regulators with little direction. The standard for compliance should be objectively measurable and reasonable. The regulators should also issue rules that clearly and objectively establish compliance standards to satisfy the “reasonable due diligence” requirement as well as compliance standards for other safe harbors.

Renters and Foreclosure

MBA opposes the provision requiring that any “successor” in interest of a foreclosed property permit a tenant to continue to reside at the property for at least 90 days. Such a requirement hampers the sale of foreclosed properties – the effect of which will be to increase costs for all loans. Further, it may extend the blight on the very communities that are harmed by foreclosures. MBA strongly advises that this approach be reconsidered.

Right to Cure

MBA strongly supports the concept of the right-to-cure provisions embodied in the bill. Right to cure provisions offer borrowers an effective means of obtaining early relief without resort to litigation.

H.R. 3915 provides the opportunity to cure an error in origination 90 days from the date of notification. However, we believe the time period for cure should begin when the creditor receives notice from the assignee. The creditor will be charged by the securitizer with the responsibility to address the claim and should not be disadvantaged in its investigation by any delay in transmission of the claim from the securitizer.

Six Year Period of Liability and Defense to Foreclosure

H.R. 3915 allows consumers to exercise their rescission rights for extended periods of time - which exposes assignees to significant liability well into the life of the loan. Specifically, a borrower can make a rescission claim during the first six years of the loan. A borrower can also make a rescission claim as a defense to foreclosure over the life of the loan or where the borrower has been in default for 60 days or more. The lender does not have to initiate foreclosure or accelerate indebtedness in order to trigger the rescission right. Instead, the borrower can assert the claim at any point that the borrower is sixty days or more delinquent, regardless of whether the lender has sought to enforce the loan's terms. This is an alarming provision that would permit borrowers to game the system. A borrower would be able to cease paying on their mortgage, make a claim to rescind the loan and forestall foreclosure.

H.R. 3915 should explicitly provide that the borrower should return to the lender the value of the principle loaned. Under such a provision, if the home value has depreciated due to economic factors or because of a failure of the owner to maintain it, the lender would not be disadvantaged. This provision is consistent with the theory behind rescission which is to put the parties back in the positions they were in before the transaction took place. The absence of these changes would significantly disadvantage the lender and allow a borrower to be unjustly enriched.

Finally, H.R. 3915 should explicitly provide that any person who encourages a borrower to default or defraud a creditor in an effort to take advantage of the rescission remedy should be penalized and held criminally accountable.

TITLE III

H.R. 3915 amends the Home Ownership and Equity Protection Act (HOEPA). The HOEPA thresholds are the functional equivalent of a usury ceiling. Lenders do not make loans that trigger HOEPA coverage. This is because HOEPA loans give rise to enhanced liability exposure including assignee liability. Expanding the scope of loans that would be covered by HOEPA means that additional loans just will not be made. Therefore, Congress should be very careful about where the triggers are set because if they are set too low it could cut off legitimate lending.

H.R. 3915 establishes three triggers that, if met, qualify a loan as a high-cost loan which carries with it significant liability; (1) the point and fee trigger under H.R. 3915 is set at five percent and includes YSPs and prepayment penalties, (2) the APR trigger mirrors current requirements at eight percent and (3) a prepayment penalty trigger.

With respect to the point and fee trigger - the effect of both lowering the point and fee trigger from eight percent which is current law to five percent - as well as including yield spread premiums and prepayment penalties, will most certainly result in cutting off legitimate lending. Lenders will not make prepayment penalties or pay yield spread premiums – which have been valuable consumer financing options.

The prepayment penalty trigger states that the charge or collection of prepayment fees or penalties more than 30 months after the loan closing or the fees/penalties exceed in the aggregate, more than two percent of the amount prepaid qualifies the loan as a high cost loan.

The option of a prepayment penalty in connection with a mortgage allows a borrower to choose a lower rate and lower monthly payments in return for agreeing not to refinance within a set period unless he or she pays a fee. A lower rate can be offered because the presence of a prepayment penalty assures a more reliable income stream for investors in pools of such mortgages and, consequently, better pricing for securities and consumers themselves.

MBA has long been committed to transparency and informed consumer choice and, in that vein, believes that prepayment penalties should always be optional and result from true consumer choice. Accordingly, MBA would support a requirement as part of a uniform lending standard that originators provide borrowers with a choice of a loan rate with and without a prepayment penalty, if available.

CONCLUSION

MBA shares the goal of enacting a uniform national standard that would provide clear protections against abusive mortgage lending for consumers while allowing the industry to provide needed credit. While we believe H.R. 3915 offers considerable promise to finally achieve such a result, we also believe that the bill as written has significant flaws.

We look forward to working with the committee to improve the bill and finally achieve our shared goal. We stand ready to assist in any way that we can.